

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW LYLE LOWRY,

Defendant and Appellant.

C085687

(Super. Ct. No. CM042169)

Defendant Matthew Lyle Lowry appeals a judgment entered after a jury found him guilty of attempted murder (Pen. Code, §§ 664, 187, subd. (a))<sup>1</sup> and found true the special allegations that he caused his victim to become paralyzed or comatose (§ 12022.7, subd. (b)) and personally used a deadly weapon (§ 12022, subd. (b)(1)). The jury found the allegation that defendant acted with deliberation and premeditation not true, and the trial

---

<sup>1</sup> Further undesignated statutory references are to the Penal Code.

court separately found defendant had suffered a prior prison term (§ 667.5, subd. (b)) and sentenced him to a total aggregate prison term of 14 years.

Defendant argues the trial court prejudicially erred in admitting his confession, made following his invocation of his right to counsel protected by *Miranda v. Arizona* (1966) 384 U.S. 436 under circumstances governed by *Edwards v. Arizona* (1981) 451 U.S. 477 and its progeny. He makes alternative arguments concerning the trial court's consideration of and ruling on his motion in limine to exclude the confession, and also argues ineffective assistance of counsel. These are claims we need not reach for reasons we explain *post*, nor need we reach two claims that he withdrew after briefing was completed. Because we find admission of defendant's confession did not violate his right to counsel, we affirm the judgment.

### **BACKGROUND**

Defendant was suspected of perpetrating a vicious attack on a transient who had been staying with defendant's aunt. After a night filled with the consumption of intoxicating substances that left him in an agitated state, defendant was found standing with blood on his hands in the same room as the bloody victim. The victim had fractures to the bones in his face and head and stab wounds in his neck. A bloody knife and a baseball bat were also found at the scene of the attack.

Authorities arrested defendant and transported him to the station where he was questioned. His interrogation was videotaped, the entirety of which was admitted into evidence and played for the jury at his trial. This video confession is the basis for defendant's claim of error on appeal, and we discuss it in more detail below.

Both parties filed motions in limine regarding the confession, with the People seeking its admission and defendant seeking its exclusion, based on the argument that defendant had requested counsel during the interview, but the detectives had improperly continued their questioning. The trial court held a hearing where it reviewed the motions and heard argument but no live witnesses; it also reviewed a partial video of defendant's

confession that ended shortly after defendant asked for counsel. The court ruled defendant had waived his right to counsel and admitted the disputed confession in its entirety.

## **DISCUSSION**

### **I**

#### *Admissibility of Confession*

Defendant contends the trial court erred in refusing to exclude defendant's confession made following his invocation of his right to counsel. Although he makes several related arguments based on allegations of infirmity in the trial court's reasoning, the court's review of only a partial video of his confession, and trial counsel's performance in connection with that review, he repeatedly urges us to review the video seen by the jury and decide independently whether his confession was obtained without violation of his constitutional rights. Having done so, we conclude that our task is complete without addressing defendant's additional arguments.

#### *A. The Law*

We agree with defendant that our review is de novo where, as here, the facts are not subject to dispute, and the trial court made no factual findings to which we must defer. “ ‘Where . . . an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review.’ [Citation.]” (*People v. Jackson* (2016) 1 Cal.5th 269, 339.)

As our Supreme Court explained in *People v. Enraca* (2012) 53 Cal.4th 735, 752:

“Police officers may legitimately endeavor to secure a suspect's participation in the interrogation process so long as constitutional safeguards are honored.

“Once an in-custody suspect invokes his right to either silence or counsel, interrogation must cease. [Citation.] If the right to counsel is invoked, the suspect cannot be interrogated further, unless counsel is provided [citation] or the suspect reinitiates contact with the police. [Citations]. Interrogation includes both express questioning and ‘words or

actions . . . the police should know are reasonably likely to elicit an incriminating response from the suspect.’ [Citation.]

“ ‘After a suspect has invoked the right to counsel, police officers may nonetheless resume their interrogation if “the suspect ‘(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.’ ” [Citations.] The waiver must be “ ‘knowing and intelligent . . . under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.’ ” [Citation.]’ [Citations.] The prosecution has the burden of proof on these points.”

### B. *The Confession*

We have reviewed the complete video of the confession shown to the jury and briefly describe its relevant portions as follows.

After placing defendant in the interview room, the detective promised to get him some water and move his handcuffs to the front, then did so. Defendant was advised of his *Miranda* rights and affirmed he understood them but was not asked for and did not give an express waiver. When asked if he knew why he was there, he guessed that he was there on suspicion of attempted murder, but denied knowing what happened. He denied he had “any real altercation” with the victim, although he accused the victim of stealing from his aunt.

He said he heard his aunt scream “ ‘No, no,’ ” while he was in the shower with his girlfriend and that he was in that shower when the attack on the victim occurred. When asked what happened after he came out of the shower and saw blood, defendant stated, “Well, like I said, I - I don’t know. I can’t explain it.” One of two detectives in the interrogation followed up, “Now, you don’t know ‘cause you don’t remember or you don’t know because you didn’t see or you don’t know because you don’t wanna say, what do you think?” Defendant stated, “Well, I just couldn’t - I couldn’t comprehend what happened.” “I think - I think I may have caused him to get hurt.” When asked whether he assaulted the victim, defendant stated “[S]omething like that.” Defendant knew the victim was hit with the bat first and then stabbed. He guessed that the victim was

probably hit with the bat in his face, and he was stabbed “[r]ight in the face.” He denied knowing how much time elapsed between the hitting and stabbing.

The following exchange then occurred:

“[DETECTIVE 1]: Who hit him?

[four second pause]

“[DEFENDANT]: Um, I want a lawyer.

“[DETECTIVE 1]: You want a lawyer?

“[DEFENDANT]: Yeah.

“[DETECTIVE 1]: Okay. That’s fine.

“[DETECTIVE 2]: All right.

[one second pause]

“[DEFENDANT]: I hit him, dude. I did it. I hit him and I stabbed him.

“[DETECTIVE 1]: Okay

“[DEFENDANT]: And I’m not afraid to admit it, man. I guess you guys fucking lock me away forever ‘cause I’m just a piece of shit.

“[DETECTIVE 2]: You’re not a piece of shit.

“[DETECTIVE 1]: We never said that.

“[DEFENDANT]: Cause he - he didn’t - ca- cause he deserved it. He deserved it. I don’t know if he’s, I didn’t mean to do it. I didn’t wanna do it. I don’t know what came over me. I don’t know what the fuck was freaking my aunt out. I don’t know why the fuck he was always all over us, you know? Every time I left the room it was so - it was like I was living in a scary fucking situation, man. Like I - I - I couldn’t breathe when I left that room because I had to worry about my aunt. I had to take a shower with the door open, with my aunt in the other room just so that I could feel like my aunt was safe.”

Soon thereafter, detectives again asked the defendant several times whether he wanted an attorney, reminding him that he had the right to counsel and that he had asked

for a lawyer, even telling him, “You have the right to an attorney and we don’t wanna deprive you of that right.” After each comment and question defendant started talking to the detectives again without explicitly waiving counsel. Defendant asked what an attorney would do and stated that he could have had one “from the gate” and that he would have “probably got away” without the detectives knowing he was the perpetrator. Detectives asked several more times whether defendant wanted to keep talking to them, but defendant gave equivocal answers and kept talking. The detectives eventually stopped asking about counsel.

The interrogation continued, and defendant continued to provide information. He admitted to hitting the victim three times with a gray aluminum bat. He did not know how many times he had stabbed the victim. He left the shower when he heard his aunt yell. The victim was grabbing for his aunt, who left the room and started crying. Defendant got the baseball bat by the refrigerator and, “out of nowhere, [he] just busted him up.” Defendant wanted to put the victim out of his misery. He stabbed the victim because he “didn’t want him to suffer.” At one point, defendant asked whether they were “recording all of this,” getting answers from each detective and then followed up, specifically asking whether there was a recorder *in the room*, after each detective denied having recording devices. During the entirety of the remaining recording, defendant did not mention a lawyer again.

### C. Analysis

Defendant does not challenge that he was advised of and acknowledged he understood his *Miranda* rights at the outset of the interrogation, although he disputes in passing that the implicit waiver should be acceptable, while acknowledging that our Supreme Court permits the practice.

After acknowledging his rights and sitting for approximately 20 minutes of questions, and in response to the detectives’ question “who hit him?”, defendant asked for a lawyer. The detectives clarified and acknowledged the request and did not ask

another question. Instead, within 10 seconds of asking for a lawyer and *within one second* of the detectives' final comment about the invocation, "All right," defendant gave a series of quick spontaneous statements beginning with: "I hit him, dude. I did it. I hit him and I stabbed him." Under these circumstances, it is clear defendant voluntarily reinitiated contact with detectives and that he did not do so in response to illicit police interrogation. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1311 [detective properly responded to defendant's question about " 'what was going on' " and defendant then expressed a willingness to discuss case].) Although defendant argues that the detectives' efforts to terminate the interview after his invocation fell short, as they "remained seated," our review of the interview reveals that defendant reinitiated his interview so quickly and suddenly after saying he wanted counsel that the detectives were able to do little more than react and continue to sit and listen, while trying to secure a second waiver, as we have described.

Defendant argues alternatively that the lapse of only seconds between his invocation and re-initiation shows that the decision to keep talking without counsel was "made with undue haste and without due consideration." As we have explained, the law requires that the re-initiation after invocation be knowing and voluntary. (See *People v. Enraca*, *supra*, 53 Cal.4th at p. 752.) Under the totality of the circumstances, defendant's actions here present as such. Defendant confirmed he understood his *Miranda* rights at the beginning of the interview. Only 20 minutes later, he invoked one of them--his right to counsel--and then seconds later revoked the invocation by continuing to blurt out inculpatory information. Shortly after he resumed his own interrogation, defendant made statements showing he understood the nature of the right he was giving up, acknowledging he could have had an attorney "from the gate." He also noticed that both detectives had sidestepped his question about being recorded and pressed to obtain an answer, broadening his question to include recording devices in the interrogation room itself. He clearly was aware of his rights, what he was doing, and who he was talking to.

The limited time between defendant's invocation and continued confession does not change this result. (See *People v. McCurdy* (2014) 59 Cal.4th 1063, 1089 [defendant reinitiated contact 20 seconds after invoking by asking about other suspects]; *People v. Marshall* (1990) 50 Cal.3d 907, 926 [proper to question suspect who, without police prompting and immediately after invoking counsel, changed his mind].)

Although defendant argues that the detectives' unsuccessful attempts to elicit an express waiver of rights from him following his re-initiation diminishes the propriety of admitting that confession, we disagree. Defendant continued to speak with detectives for approximately 30 minutes after changing his mind without asking again for a lawyer, despite their reminding him of his previous invocation and telling him they didn't want to take away his right to counsel. He provides no authority for his argument that following invocation of the right to counsel, a defendant must *explicitly* waive his right to counsel for interrogation to resume. That is not the test for a knowing and voluntary waiver. To the contrary, we may consider circumstances occurring after re-initiation in determining whether an implied waiver occurred, and ambiguous statements about self-incrimination do not invalidate a finding of implied waiver. (See *People v. McCurdy, supra*, 59 Cal.4th. at pp. 1089-1090.) Like *McCurdy*, here, detectives repeatedly made clear it was defendant's choice whether to continue the interrogation, and defendant repeatedly (and at times unstopably) chose to continue talking.

Although defendant relies on *People v. Sims* (1993) 5 Cal.4th 405, that case is inapposite. In *Sims*, the defendant did not re-initiate; instead the interrogation resumed after a simple and unrelated question by defendant. (See *id.* at p. 441 [inquiring "what was going to happen from this point on" did not operate to waive the defendant's *Miranda* rights].) Here, because we find defendant's unprovoked re-initiation of his explicit confession was knowing and voluntary, the detectives were free to ask him questions unless and until he again invoked one of his constitutional rights.



## II

### *Remaining Claims*

Defendant argues at length concerning errors related to the trial court's failure to consider the entire recording of the interrogation in its in limine ruling, and alternatively argues counsel was ineffective for permitting this truncated review. But because we have reviewed defendant's entire confession in the form seen by the jury, and determined the confession's admission in its entirety did not violate defendant's constitutional right to counsel, we need not address these additional arguments to conclude no error occurred.

### **DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
/s/  
Duarte, J.

We concur:

\_\_\_\_\_  
/s/  
Raye, P. J.

\_\_\_\_\_  
/s/  
Robie, J.